

Claimant alleges he injured his back on June 9, 2003, when he moved a large rock while working for respondent. In the February 24, 2006, Award, the Judge found claimant sustained a 10 percent whole person functional impairment due to that work-related low back injury. The Judge also determined claimant failed to notify respondent of his injury within 10 days of the accident but that claimant had "just cause" for that failure. In short, the Judge awarded claimant a 44.4 percent permanent partial general disability, which was based upon a 64.4 percent task loss and a 24.4 percent wage loss. In addition, the Judge

awarded claimant an additional 28 weeks of temporary total disability benefits, which represented the period from June 10, 2003, through December 23, 2003.

Respondent and its insurance carrier contend Judge Benedict erred. They argue claimant should be denied workers compensation benefits as he failed to notify respondent of the accidental injury within 10 days of the alleged June 9, 2003, accident. In addition, they argue the Judge erred by finding there was "just cause" to extend the time period for reporting the accident. They also argue the Judge erred by awarding claimant additional temporary total disability benefits as the record is allegedly devoid of any medical expert opinion that claimant was temporarily and totally disabled during the period in question.

Conversely, claimant argues the Award should be affirmed. But contrary to the Judge's finding, claimant contends he notified respondent of his back injury within 10 days of the accident. Claimant argues the evidence is uncontradicted he told his supervisor on June 10, 2003, that he had injured his back at work the day before. In the alternative, claimant argues the Judge correctly determined there was "just cause" for extending the period for providing notice. In summary, claimant asks the Board either to find that he provided respondent notice of the injury within 10 days of the accident or, in the alternative, to affirm the Judge's findings and conclusions.

Neither party challenges the Judge's findings regarding permanent partial general disability as determined under K.S.A. 44-510e. Accordingly, the only issues before the Board on this appeal are:

1. Did claimant provide respondent with timely notice of his accidental injury as required by K.S.A. 44-520?
2. If so, did the Judge err by awarding claimant additional temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The Judge determined claimant injured his low back on June 9, 2003, while moving a heavy rock. Moreover, the Judge found claimant's accidental injury arose out of and in the course of his employment with respondent. The parties do not challenge that finding.

The principal issue in this appeal is whether claimant provided respondent with timely notice of his accidental injury as required by K.S.A. 44-520. Claimant is not certain he told his supervisor on June 9, 2003, that he had injured his back. At the time of the

incident claimant was wearing a back support belt. Despite that protective device, claimant had been experiencing low back tightness and general body aches since commencing work for respondent. But claimant believed the low back symptoms were from a back strain or low back injury that he sustained in approximately 1993 while in the military and that his other aches and pains were from lifting thousands of pounds of rock on a daily basis.¹ Claimant testified, in part:

So I bent over and picked up the rock, and as soon as I got it to my chest, I realized it felt different than what -- any normal pain that I've been through in the last couple years with my back. I walked it approximately 15 or 20 yards to -- or feet to a dumpster, threw it in. As soon as I dumped the rock in, the pain pretty much went away. I mean, it still ached a little bit more than normal, but it wasn't like it was that constant of a pain the rest of the day.²

. . . .

I can't recall about what I just described. I can't recall for a hundred percent that I said something that day. She [claimant's supervisor] came out, and another supervisor came out to the shed because it's pretty secluded, to check on us, and I'm pretty sure I said something, but I can't recall a hundred percent that I said this happened then.³

Despite ongoing pain, claimant was able to complete his shift. When he got home after work that day, claimant knew something was wrong with his back as it hurt worse than it had before. But he assumed he had merely aggravated his previous low back injury and that he would be responsible for any necessary treatment:

Well, I just assumed I reinjured my pre-existing condition or I made it worse, and I thought for the most part that this is my burden.⁴

Claimant believes he told his supervisor, Helen Pauly, on the day of the incident that he had hurt his back at work.⁵ In addition, claimant's telephone records indicate that in the early morning of June 10, 2003, he telephoned both his supervisor's home and respondent's offices. Claimant believes he reached an answering machine or voice mail

¹ Sineway Depo. at 47-48.

² R.H. Trans. at 28.

³ *Id.* at 29.

⁴ *Id.* at 30.

⁵ Sineway Depo. at 23-24.

in both telephone calls. He also believes the message he left for respondent and his supervisor stated that he was not able to work that day as he had hurt his back at work the day before.

Claimant also called work the next morning, June 11, 2003, to advise that he had a doctor's appointment that day at a Veterans Administration (VA) hospital. After that appointment claimant telephoned respondent and advised that he had been taken off work for three days and that he probably would not be back to work until the following Monday. Claimant was advised he had to have a medical release before he could resume working. But he was unable to procure such a release and on June 18, 2003, claimant received a letter from respondent terminating his employment.

In July 2003, claimant consulted his attorney about an unemployment claim. At that time claimant learned that workers who aggravated preexisting injuries or conditions could receive workers compensation benefits. Consequently, claimant promptly filed a claim for those benefits. It is not disputed that the claim for workers compensation benefits was served upon respondent within 75 days of the alleged June 9, 2003, injury.

At the time of the December 2005 regular hearing, claimant was not working. He was, however, continuing to receive medical treatment from the VA including physical therapy and narcotic pain medication, anti-inflammatories, and muscle relaxants. Claimant testified several doctors had recommended surgery but he has so far declined surgery as he understood there would probably be more surgeries later to correct problems that resulted from the initial operation. In the meantime, claimant is pursuing an increase in his disability rating from the VA.

Claimant's supervisor, Helen Pauly, testified claimant never advised her he had injured his back at work. But Ms. Pauly does recall a conversation with claimant on June 9, 2003, during which she noticed claimant was favoring his back. But claimant did not relate his back symptoms to work as he told her he had previously injured his back in the 1990s and that his symptoms occasionally flared up.

Judge Benedict determined claimant failed to notify respondent of his accident or injury within the first 10 days. Nonetheless, the Judge determined claimant's notice to respondent was timely as there was "just cause" to extend the reporting period to 75 days.⁶

The Board affirms the Judge's finding that claimant failed to prove he provided notice to respondent within 10 days of the June 9, 2003, rock-lifting incident. Likewise, the Board affirms the Judge's finding that there was "just cause" to extend the period for

⁶ See K.S.A. 44-520.

reporting the incident to 75 days. The evidence establishes that claimant had reasonable questions whether the increased symptoms he experienced on June 9, 2003, were a natural consequence of his preexisting back condition or whether they signaled he had sustained a work-related injury that fell under the Workers Compensation Act.

In short, the administrative file indicates claimant filed his application for hearing on August 8, 2003, which is within 75 days of the June 9, 2003, accident. Accordingly, claimant provided timely notice to respondent of his accident.

The evidence regarding whether claimant was temporarily and totally disabled is quite limited. Orthopedic surgeon Dr. Jeffrey T. MacMillan treated claimant's low back and saw claimant nine times between January 29, 2004, and January 27, 2005. The doctor diagnosed claimant as having two degenerative discs at the levels of L4-5 and L5-S1. Dr. MacMillan recommended surgery but it was never authorized. In a January 7, 2005, letter to respondent's insurance carrier, the doctor stated that claimant had reached maximum medical improvement and that he was permanently restricted to medium physical labor. Dr. MacMillan was not asked his opinion whether claimant was temporarily and totally disabled for the period from June 10 through December 23, 2003.

On the other hand, claimant's attorney hired Dr. Peter V. Bieri to evaluate claimant for purposes of this claim. The doctor saw claimant in March 2005 and also determined claimant was at maximum medical improvement. Dr. Bieri was not asked his opinion of whether claimant was temporarily and totally disabled for the period in question. But in his March 23, 2005, report, the doctor did provide a more detailed history of claimant's treatment:

The claimant is a now 34 year old male who states that he incurred injury during the course of active employment reported on or about June 9, 2003. He was lifting and carrying 30 to 60 pound rocks approximately 20 feet, when he experienced a "pop" in his low back. The claimant had a previous history of injury related to a motor vehicle accident while on active duty in military service in 1993, and had been treated at the VA. He returned there for initial treatment, which was conservative in nature. Treatment modalities included medication, restrictions, and formal physical therapy. The claimant also obtained some chiropractic treatment as well. He remains symptomatic, and an MRI study July 11, 2003, was consistent for bulging at the level of L4-5 and L5-S1. The claimant had lower extremity symptomatology as well, and a nerve conduction study was reported on June 10, 2004 to reveal left S1 radiculopathy. Treatment was transferred to a private orthopedic consultant, who continued with conservative therapy, including a TENS unit and work conditioning. The claimant was also seen by an orthopedic consultant at the VA, who recommended surgical intervention to the low back. The claimant underwent additional evaluation, including a CT scan and diskogram which revealed leakage at the level of L4-5, and more so at L5-S1. A subsequent repeat MRI study

March 17, 2005 was consistent with an annular tear at L5-S1. The private orthopedic consultant recommended surgery as well, which has been deferred. Evidently the claimant is to see yet another orthopedic consultant in the near future.⁷

The Board finds claimant has failed to prove that he was temporarily and totally disabled for the period from June 10 through December 23, 2003. The doctors did not address claimant's work status and the remaining evidence leaves it to mere conjecture and speculation whether claimant was able to work during that period. Consequently, the Award and Award Nunc Pro Tunc should be modified to deny claimant's request for the additional temporary total disability benefits.

AWARD

WHEREFORE, the Board modifies the February 24, 2006, Award and March 3, 2006, Award Nunc Pro Tunc entered by Judge Benedict, as follows:

Kenneth S. Sineway is granted compensation from Bayer Stone, Inc., and its insurance carrier for a June 9, 2003, accident and resulting disability. Based upon an average weekly wage of \$423.11, Mr. Sineway is entitled to receive 52 weeks of temporary total disability benefits at \$282.09 per week, or \$14,668.68, plus 167.83 weeks of permanent partial general disability benefits at \$282.09 per week, or \$47,343.16, for a 44.4 percent permanent partial general disability and a total award of \$62,011.84.

As of July 5, 2006, Mr. Sineway is entitled to receive 52 weeks of temporary total disability compensation at \$282.09 per week in the sum of \$14,668.68, plus 108.29 weeks of permanent partial general disability compensation at \$282.09 per week in the sum of \$30,547.53, for a total due and owing of \$45,216.21, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$16,795.63 shall be paid at \$282.09 per week until paid or until further order of the Director.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

The Board adopts the remaining orders set forth in the Award and Award Nunc Pro Tunc to the extent they are not inconsistent with the above.

⁷ Bieri Depo., Ex. 3 at 1-2.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey Elder, Attorney for Claimant
 Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
 Bryce D. Benedict, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director